UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PINK GOOSE (CAYMAN) LTD.,	:	
	:	08 CV 2351 (HB)
Plaintiff,	:	
	:	ECF CASE
- against -	:	
	:	
SUNWAY TRADERS LLC,	:	**DECLARATION OF**
SUNWAY GROUP, SUNWAY TRADING GROUP LTD.,	:	**CHARLES E. MURPHY**
SUNWAY GROUP INTERNATIONAL HOLDINGS,	:	
SUNWAY GROUP IMPORT, SUNWAY LOGISTICS,	:	
and LINTON EQUITIES B.V.I.,	:	
	:	
Defendants.	:	

CHARLES E. MURPHY, having been duly sworn, deposes and states the following upon the penalties of perjury as per 28 U.S.C. § 1746:

1. I am a member admitted to the Bar of this Honorable Court and am a partner in the firm of Lennon, Murphy & Lennon LLC, attorneys for the Plaintiff, Pink Goose (Cayman) Ltd.

2. I submit this Declaration in opposition to Motion to Vacate Maritime Attachment filed by Sunway-Group Co. Ltd.

3. Attached hereto as Exhibit 1 is a true and accurate copy of the transcript of Rule E(4)(f) hearing dated September 29, 2006 conducted by Judge Castel in *Route Holding Inc. v. IOOI*, 06 Civ. 3428 (PKC)(S.D.N.Y. 2006).

4. Attached hereto as Exhibit 2 is a true and accurate copy of Judge Berman's Order entered June 21, 2007 in *Flora Maritime Ltd. v. Inter Eltra Int'l* GMBH, 06 Civ. 6372 (RMB)(S.D.N.Y. Jun. 21, 2007).

5. Attached hereto as Exhibit 3 is a true and accurate copy of Judge Karas's Order in *Good Challenger Navagante S.A. v. Metalexportimport S.A.*, 06 CV 1847 (KMK)(S.D.N.Y. July 17, 2006).

6. Attached hereto as Exhibit 4 is a true and accurate copy of Judge Koeltl's Order in *MTC Levant-Line GmbH, Breman, v. Pan-Pacific Int'l & Transportation Co. Ltd.*, 06 CV 3506 (JGK)(S.D.N.Y. Jan. 15, 2008).

Executed at Southport, CT this 9th day of May, 2008.

Charles E. Murphy

AFFIRMATION OF SERVICE

I hereby certify that on May 9, 2008 a copy of the foregoing Declaration of Charles E. Murphy was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF system.

By: Charles E. Murphy

EXHIBIT 1

69TVROUA Argument

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ROUTE HOLDING INC., BEAM COMPANY INC.,

Plaintiffs,

v. / 06 CV 03428 (PKC)

INTERNATIONAL OIL OVERSEAS INC. a/k/a IOOI, MARINA WORLD SHIPPING CORP.,

Defendants.

----------x

New York, N.Y.
September 29, 2006
11:30 a.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

TISDALE & LENNON LLC
Attorneys for Plaintiffs
NANCY R. PETERSON
PATRICK F. LENNON

FREEHILL HOGAN & MAHAR LLP
Attorneys for Defendants
MICHAEL E. UNGER
LAWRENCE J. KAHN

69TVROUA Argument

(In open court)
(Case called)
THE COURT: This is Route Holding, Inc. v. International Oil Overseas, Inc.
Is the plaintiff ready?
MS. PETERSON: Yes, your Honor.
THE COURT: State your appearance please.
MS. PETERSON: My name is Nancy Peterson from the firm Tisdale & Lennon, representing the plaintiffs Route Holding and Beam Company.
THE COURT: All right. And for the defendant?
MR. UNGER: Good morning, your Honor. Michael Unger

from Freehill, Hogan & Mahar on behalf of the defendant Marina World Shipping. With me is my associate Larry Kahn.

THE COURT: Good to see you. Good to see you again, Mr. Kahn.

MR. KAHN: Good morning, your Honor.

THE COURT: Good morning. All right. We are here on the defendant's motion to vacate the maritime attachment. Since the issuance of the maritime attachment in this case, we now all have the benefit of the Second Circuit's decision in Aqua Stoli, 460 F.3d 434, and also Judge Wood's very clear and helpful decision in Tide Line, Inc. against the Eastrade Commodities, Inc., and Transclear, S.A. That was an opinion issued by Judge Wood on August 15 -- I'm sorry, August 5th,

2006; docket number is 06 CV 1979. And as of seven minutes ago, it had not yet appeared on Westlaw.

It does seem clear to me that we know what we're doing here this morning in that the attachment was issued pursuant to Supplemental Rule B.

We're now at the hearing under Rule E(4)(f), and it is the party who obtained the ex parte attachment's burden to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. So the party obtaining the attachment may proceed.

MS. PETERSON: Your Honor, Aqua Stoli set forth the burden that plaintiff needs to satisfy in order to maintain the attachment.

In order for Rule B attachment to issue, a plaintiff must show that it has met the following four technical requirements:

That it has alleged a maritime claim; that the defendant is not found in the district; that the plaintiff has attached defendant's funds within the district; and that no other statutory bar to maritime attachment exists.

In addition, Aqua Stoli stands for the proposition that the plaintiff's burden does not change at the Rule E hearing. The burden to obtain an attachment is the same as the burden to maintain an attachment. Judge Wood further clarifies that.

THE COURT: Well, let's back up for a second. I'm not sure that I agree with your statement of what Aqua Stoli held. If you look at -- well, I'm not going to be able to give you an exact page number; I don't have an F.3d version of it. But the text preceding Footnote 5, it recites that the plaintiff has to show that it "has," not alleges, has a valid prima facie admiralty claim against the defendant. That's slightly different than -- and maybe more than slightly different than alleges a claim.

MS. PETERSON: Right. But Judge Wood clarifies in her opinion that what having a prima facie claim amounts to is properly alleging the elements of a maritime claim, and then an alter ego claim.

She expressly stated that it is inappropriate to engage in a fact-intensive inquiry as to the facts underlying either the maritime claim or the alter ego allegations.

THE COURT: But she points out that there is a

heightened pleading standard in a case brought, I guess invoking maritime or admiralty jurisdiction, is that correct?

MS. PETERSON: The heightened standard is to make the defendant aware what he is pleading.

In the case of Tide Line, there was no alter ego allegation made. The only allegation that was made was that the defendant was a paying agent of the interconnected entity.

In the case here, the plaintiff has alleged all the

elements of federal common-law alter ego claim; namely, that IOOI is an alter ego of Marina World Shipping; and that IOOI dominates and controls Marina World Shipping to the extent that it actually conducts business through Marina World Shipping. It's completely separate factual -- it's distinguishable from that case.

After we had satisfied our burden, the defendant has three basis upon which it can vacate the attachment according to Aqua Stoli; namely, that the defendant can be found in a convenient adjacent jurisdiction that the defendant can obtain personal jurisdiction in a district where the plaintiff is located or that the plaintiff has obtained sufficient security.

Aqua Stoli explicitly listed the three bases upon which the defendant may vacate an attachment. It left the door open for some equitable concerns; however, those equitable concerns are not here today. Defendant is a debtor who's not paying its debts. And if our case is borne out, as we suggest it will be, it will turn out that IOOI and Marina World Shipping are the same company who are avoiding paying their debts to the plaintiffs.

Defendant is relying on outdated case law when it suggests that we must prove a probable cause or a reasonable basis, reasonable grounds standard for making our alter ego allegations. Once we have satisfied the basic elements of a maritime claim and an alter ego claim, we have satisfied our

burden in that regard.

Plaintiff has alleged a maritime claim against IOOI that it has breached the maritime contract, and it has alleged the alter ego claim against Marina World Shipping. Furthermore, in subsequent submissions, we have submitted a raft of evidence showing a relationship between IOOI and Marina World Shipping, which, according to both Judge Casey, in the recent case of Maersk v. Neewra, is you can review in order to determine if we had made adequate allegations. In addition, Judge Kaplan, in a recent case of Metalinvest v. Burwil Resources also held that you review the entire record to determine if we have met our basic pleading allegations.

As the plaintiff has satisfied its burden to show that it has a prima facie claim, and defendant has not met its burden to show the three reasons for vacatur, the attachment should be upheld and the motion to vacate denied.

THE COURT: Thank you, Ms. Peterson. Let me hear from Mr. Unger.

MR. UNGER: Good morning, your Honor. Let me begin by referring the Court to the advisory committee notes of Rule B. Under those notes, it says contrary to whatever interpretation plaintiffs want to put on Aqua Stoli, the defendant can attack

the pleadings for insufficiency or any other defect in terms of the process.

Here, the defect is that the complaint is plainly

insufficient to meet the standards required under Rule 8(a), let alone the higher standard required under Rule 9(b).

The case law is such, and, in particular, I refer the Court to In Re: Currency Conversion Fee Anti --

THE COURT: If I may just have you pause for a second. Why do you invoke Rule 9(b)?

MR. UNGER: Rule 9(b) is the specificity of pleading rule, your Honor.

THE COURT: I'm familiar with that.

MR. UNGER: And here, the courts have said that veil-piercing claims are generally subject to the pleading requirements imposed by Rule 8(a), which requires only a short and plain statement of the claim, showing that the pleader is entitled to relief.

However, when a veil-piercing claim is based on allegations of fraud, the heightened pleading standard Rule 8 is the lens through which those allegations have to be examined. Okay.

Here, they haven't alleged fraud.

THE COURT: So that goes back to my question. Why are you talking to me about Rule 9(b)?

MR. UNGER: I just refer to Rule 9(b), but what I'm saying is it doesn't even reach the lower standard of Rule 8.

THE COURT: But we're in agreement Rule 9(b) does not control in this case?

MR. UNGER: That's correct, your Honor.

THE COURT: Okay. Thank you.

MR. UNGER: I apologize if it was confusing. But the case I was referring to, In Re: Currency Conversion Fee Antitrust Litigation, which is 265 F. Supp. 2d 385 Second Circuit -- I'm sorry, Southern District 2003.

The Court stated in that case that purely conclusory allegations cannot suffice to state a claim based on veil piercing or alter ego liability, even under the liberal notice pleading standard under Rule 8(a).

The plaintiff has to come in, and the plaintiff has to demonstrate with proof, credible proof, that there is an alter ego relationship between the two defendants that they've named. Plaintiff only has a real cause of action and a real gripe with IOOI with whom it had its contract, because IOOI didn't pay up or hasn't agreed to post security, and I don't know exactly where plaintiff and IOOI are in terms of their arbitration.

Plaintiff in this action decided that they were going to come into court and add MWS, Marina World, as a defendant, and that's a tactic that they are using in order to try to strongarm either a settlement or the posting of security by IOOI in connection with the London arbitration and the merits of that dispute.

Turning back to the Aqua Stoli case. It's incorrect to say that there were only three bases on which to challenge

an attachment. The Second Circuit specifically said in Aqua Stoli that among the bases to challenge are, and it proceeds to list the three examples that counsel for the plaintiff cited.

THE COURT: And then they go on to further define the universe by saying, "We also believe vacatur is appropriate in other limited circumstances," which are well-described in the opinion. And they also describe what circumstances do not qualify for vacating the attachment. Go ahead.

MR. UNGER: Here, your Honor, what we're challenging, effectively, is that there is no maritime claim. And, therefore, the Court lacks subject-matter jurisdiction in respect to the claims against Marina World. And the reason the Court lacks subject-matter jurisdiction is because there is no alter-ego relationship between the two named defendants.

THE COURT: Where do I find your subject-matter jurisdiction argument laid out?

MR. UNGER: It's not specifically set forth as such in our papers, your Honor; but what we do argue is that there is a defect in the pleadings. And that's the defect. The defect is that there is a lack of jurisdiction here. And there's a lack of jurisdiction because there is no, in fact, alter-ego relationship between the companies; and there is no -- the way that it's pled in the complaint, that doesn't suffice under Rule 8(a) to state a maritime claim.

The Aqua Stoli case says, in effect, that plaintiff

has to show that it has a valid maritime claim, okay. And if that's the case, you're allowed to test the validity of whether that claim that they are alleging is valid.

Here, this Court has the right to look at the evidence. And plaintiff having the burden of proof, they haven't shown a maritime claim against Marina World. And the reason they haven't is that the evidence that they have put forth, and let's look at what they put forth, before they ever filed the claim, all they knew was there were a couple of payments that had been made over eight years by Marina World on behalf of IOOI. And Mr. Bakri from Marina World explains in his several declarations why that was done. That's been unchallenged. And I don't believe that that gave a good-faith basis to file this complaint in the first place.

But even if you get past that and you look at the rest of the evidence, what do we have? A couple more payments we learn have been made. But that's it. Then you get into all the plaintiff's smoke-and-mirrors in terms of trying to tie Marina World and IOOI together. And, quite frankly, your Honor, they don't even come close.

The evidence that they show at best is based on speculation, rumor, innuendo, hearsay from unnamed "market sources" and investigations that were commenced. They give you a four-year old report in connection with IOOI and its supposed relationship with the Bakri group, which Mr. Bakri explains is

basically a loose association of companies that try to capitalize on the goodwill of one another.

You have, in addition to that, plaintiff coming in

with all kinds of suggestions in terms of the fact that there are shared addresses, IT information that's shared. None of this adds up to putting Marina World being so dominated or controlled by IOOI or the converse, that they can meet the ten-point tests that are set out in terms of what you have to show in order to have an alter-ego claim.

At best, all plaintiff has done is shown, if you want to accept it, that IOOI may have some kind of relationship with the Bakri group, Bakri navigation, and any of the 12 or 13 other companies that are named throughout the course of the papers. But what's not in any of that is Marina World in this web that they've painted. Marina World is out here. And there's no evidence which ties Marina World directly to IOOI, or to IOOI through the Bakri group, or any of the Bakri group companies.

Effectively, if you follow plaintiff's argument, up on the west side of Manhattan you have the Potamkin Auto Group. And he's got ten different dealerships. And if I buy a Chrysler from Potamkin Chrysler, and I don't like it, under plaintiff's theory, I could allege that their alter egos and go after Potamkin Chevy. Why? Because Mr. Potamkin has his hand in a whole bunch of these dealerships. Mr. Potamkin may own

the various buildings or have a company that owns the various buildings the dealerships are in. That doesn't get you over the hump.

There's no good-faith basis to have brought this claim. And they haven't shown it even when they've had the burden of showing it, that there is an alter ego relationship.

Thank you, your Honor.

THE COURT: Thank you, Mr. Unger. Let me hear from the plaintiff. And I guess a question I would like answered is does supplemental Rule E(2)(a) apply as to the pleading. And let me hear as to how does the plaintiff view that rule as affecting its pleading obligation here.

MS. PETERSON: What do you explicitly mean by Rule E(2)(a)? Do you mean the pleading requirement?

THE COURT: All right. There is a requirement that, "The complaint state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

And Second Circuit has held that this standard is more stringent than the pleading requirements of the Federal Rules of Civil Procedure. That's what I'm referring to.

MS. PETERSON: Your Honor, first, I believe that we have satisfied that burden; and that we have stated the facts

and circumstances for having the breach of the contract and the reasons behind us attaching the funds of Marina World Shipping; namely, that they are in an alter ego relationship such that we do not have to move for a more definite statement.

And, subsequently, we have submitted considerable evidence in our various submissions and declarations clarifying our pleadings and putting forth more evidence.

In addition, I don't believe that the standard -- that

we should apply a motion-to-dismiss standard at the Rule E hearing. We're not judging the sufficiency of the pleadings in terms of a motion to dismiss any set of facts upon which relief can be granted. We're looking at a Rule E special hearing at which we're seeing if the elements of the claim have been alleged, and if the circumstances has also been alleged, according to Rule B(a)(2).

Judge Casey explicitly addressed this in the case of Maersk v. Neewra, where he said you can look at the entire record to determine a pleading burden, unlike a motion to dismiss; and that if we were to apply any set of facts or look at the facts, Rule E would completely subsume Rule 12(b)(6). There would be no difference, included there should be a difference in the standard.

If the defendants would like to challenge the facts underlying our pleadings, they should raise a motion to dismiss or a motion for summary judgment. However, that is the

appropriate form in which to challenge them. Right now we're looking at the bare bones of the complaint and our supplemental submissions.

May I add a few -- address their argument?

First of all, as to the subject-matter jurisdiction argument that they have made, the defendant does not dispute that we have alleged a maritime claim against IOOI. We have alleged an alter-ego claim against Marina World Shipping. Therefore, it's an alter-ego maritime claim. In the subject-matter jurisdiction, it's not relevant and wasn't briefed by the defendants.

THE COURT: In other words, what you're saying is even if for some reason I accepted everything that the defendants said and tomorrow granted a motion to dismiss Marina World from this case, this Court's subject-matter jurisdiction would not evaporate?

MS. PETERSON: Exactly.

THE COURT: Thank you. Go ahead.

MS. PETERSON: As to the evidence, where they are attacking the evidence as hearsay and in the declarations, they are holding us to a trial standard. This is the Rule E hearing. You can submit any sort of evidence at this stage to support your allegations. And we can submit case law to support that, if your Honor would like.

In addition, there is no case law to suggest that we

have to submit proof at this stage of the hearing to support our allegations. Aqua Stoli and Judge Wood found that proof at this stage is inappropriate; and that would be going directly against her decision, I feel, to require to submit all facts at this stage prior to discovery or being able to use discovery tools to obtain evidence.

And even assuming arguendo that the defendants are correct that we have to make some sort of evidentiary showing, which we vigorously deny, we have shown significant evidence that IOOI and Marina World Shipping are, in fact, alter egos.

Even without the benefit of discovery, we have uncovered 15 payments being made by Marina World Shipping on behalf of IOOI. There's been no evidence submitted to show

that there was -- Mr. Bakri claims that there's an assignment of payment. However, there's absolutely no paper, there's no evidence of a debt being assumed from Marina World Shipping to IOOI, there's no evidence of an assignment actually being made, and the people that received the payments can confirm that they were never informed of an assignment. The only evidence is a self-serving statement that a payment assignment can be made.

And it suspends disbelief to believe that in these 15 separate incidences that we know about, they executed assignments of payment. In addition, IOOI refers to Marina World Shipping's account as its own. In the two instances where IOOI owed money to a creditor, and it informed them that

it would be sending money from its bank, when the confirmation came through, it was from Marina World Shipping. It is referring to Marina Shipping as its own account and using it as its piggy bank. Its role is to sign the maritime documents; Marina World Shipping's job is to pay the debts. And in this way, it completely insulates IOOI and the Bakri family-at-large from liability.

IOOI and Marina World Shipping reside at the same location in Saudi Arabia at the Al Dulas Bakri Building owned by a Bakri corporation. Mr. Bakri has submitted a lease allegedly showing that this is an arm's length transaction that Marina World Shipping leases from the owner. However, this lease does not specify an office, a floor. This is a lease that specifies that they have leased somewhere in the Bakri building. This has no evidence to show that, in fact, they maintain a separate office or in any way separate from IOOI.

In addition, the directors of IOOI are all apparently employed by the Bakri family. Marina World Shipping directors are made up of all Bakri family members. IOOI's directors are all apparently employees of the Bakri corporations. One is in the legal department of a Bakri-owned corporation; one is a member of and works for a self-described company in the Bakri organization; and the other one works in another separate subsidiary of a Bakri corporation. There's clear ties between these directors.

Marina World Shipping and IOOI are one entity; the two pockets in the same pair of pants.

The maritime report, which defendants claim is four years old -- which is four years old, but which is equally relevant today, shows that the Bakri family uses IOOI as their chartering arm. They use it to enter into transactions. And, as I said, Marina World Shipping is the piggy bank. They are almost like two departments; they are the same company.

And, finally, the audit that Mr. Bakri submitted allegedly to show that it has above-the-board records, reveals that it enters into related party transactions regarding ship charters. What these transactions are, I am unsure. However, upon a minimal amount of discovery, I believe we can find out. However, this in no way establishes that they are separate from IOOI.

And, in addition, again, upon a minimal amount of discovery, we believe we can uncover many more payments made on behalf of Marina World Shipping -- made on behalf of IOOI by

Marina World Shipping.

The owners in this case have approached people in order to find out about more payments; however, they came to them and said we have a confidentiality clause in our charter party. So they couldn't help even if they wanted to. Upon being awarded discovery, we can certainly clarify how often Marina World Shipping is certainly paying on behalf of IOOI.

And, as such, I believe plaintiff has met its burden, either under the defendant's alleged pleading requirements or under whatever Judge Wood's pleading requirements in Tide Line. And for that reason, the attachment should be upheld.

THE COURT: Thank you. It is the plaintiff's burden, and so the plaintiff gets to go first and last; but, Mr. Unger, I'll give you an opportunity briefly if there's something additional you wanted to say.

MR. UNGER: A couple real quick points, your Honor. We're back to the has versus alleges argument in looking at what they talked about. The evidence, it doesn't have to be admissible at this stage, but it has to be credible. And it has to support the allegations. And, quite frankly, the evidence that they have does neither.

The allegation that Marina World hasn't supplied any paper to document the assignments, it's not Marina World who has the burden of proof, it's the plaintiff. And it was never challenged by the plaintiffs, okay. The fact that IOOI says we have instructed our bankers, I don't know why, but it certainly is not compelling evidence that there is an alter-ego relationship. And, in fact, the argument that Marina World is used as IOOI's bank is undermined by the fact that IOOI paid the settlement in the prior case, the Garda Shipping case, which is referred to in the papers, out of its own funds. They're holding the lease to U.S. standards rather than Saudi

standards; yet they don't have any evidence to show you what the practice is in terms of Saudi leasing of offices. Mr. Bakri is the only evidence that is before the Court, and Mr. Bakri explains what happens. Okay.

They never closed the circle between IOOI, the Bakri group, and Marina World. The four-year old report is not relevant.

In terms of any suggestion as to discovery, discovery has never been asked for prior to today, and it shouldn't be. In terms of the suggestion that the motion should be held only in terms of a summary judgment standard, basically that allows the plaintiff then in any instance, with even the barest whisper of a connection between two companies, to say, A is the alter ego of B; and that alleged alter ego can't challenge it until it's gone through miles and miles of legal hoops and legal proceedings, effectively all the way to trial.

If Marina World had not challenged the money being attached in this instance, look at what would have happened. Plaintiff would have had to get a judgment -- I'm sorry, an award in London against IOOI, and then seek to confirm that award. And then plaintiff would still have the burden of proving down the road that IOOI and MWS are alter egos in order to go ahead and collect a judgment here against MWS.

So it goes beyond the realm of common sense to say that they shouldn't have to have that ability to go ahead at

this early stage and have some credible evidence that the two are linked in order to have taken the step that they have done.

MR. KAHN: Your Honor, if I could be heard on just one brief point brought up by plaintiffs regarding the Maersk v. Neewra case, which was recently decided by Judge Casey, and the dismissal standard that we're also seeking here.

As Mr. Unger said, the Court would still have jurisdiction over the case generally, but only against IOOI if the case is dismissed against Marina World.

And what occurred in the Maersk v. Neewra case, if you look at it carefully, you'll see that the plaintiffs are expanding what was actually said in that case. In the Maersk v. Neewra case, what happened was the defendant moved to vacate the attachment on maritime attachment grounds, and then also sought to dismiss a RICO cause of action on the grounds that it was not sufficiently pled. And the Court held that it was improper at that time to attack the RICO cause of action in an E(4)(f) hearing. The Court found that there was no basis to do that, particularly where the defendant had not yet appeared.

One slightly complicating wrinkle in that case was that the defendant, who appeared only in the guise of garnishee and not as the defendant, it was proven at the E(4)(f) hearing that the garnishee actually was the defendant. He was playing a name game; he had essentially multiple IDs with slightly different spellings of his name. And Judge Casey saw through

that and saw this is all the same person.

But with respect to the standard for dismissal, Judge Casey held that what was going on in that case was that it was improper in the context of an E(4)(f) maritime hearing concerning whether or not an attachment should be vacated to challenge whether a RICO cause of action was sufficiently pled under 9(b).

And so the reading urged by the plaintiffs here I think is over-expansive, goes well beyond what Judge Casey actually decided in the Maersk v. Neewra matter.

Thank you.

THE COURT: Thank you. On May 4th, 2006, I signed an order directing the clerk to issue maritime attachment against property of IOOI and Marina World. Thereafter, I scheduled an initial pretrial conference in this case, and had a conference held on July 14th. The defendant indicated a desire to move to vacate the attachment, and I set a schedule for the motion to be made four days later, set a date for replies, responses and replies, and set a date for a hearing of August 1, 2006.

And there is certainly nothing unusual or inappropriate about it, but I do want to make it plain for the record, subsequently I received requests to adjourn the hearing, including a letter request by Mr. Unger dated July 31st, which caused me to move it till August 28th. And then a further request from Ms. Peterson that it be adjourned to a

later date, and it was moved to today. So that's what brings us here today.

This is the hearing required under Rule E(4)(f) of the supplemental rules for certain admiralty and maritime claims. And the rule provides that whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated, or other relief granted consistent with these rules.

In the very recent decision of the Second Circuit in Aqua Stoli, which is 2006 Westlaw, 2129336, and that is now recorded at 460 F.3d 434 Second Circuit, July 31, 2006, the Court had occasion to examine the historical underpinnings of maritime attachment and the process by which maritime attachment may be vacated.

I have spent some time with that opinion in examining it, studying it, and I'm not going to endeavor to summarize it here today. But I do note that the holding of the Court is that in addition to having to meet the filing and service requirements of Rule B and E, an attachment should issue if the plaintiff shows that, one, it has a valid prima facie admiralty claim against the defendant; two, the defendant cannot be found within the district; three, the defendant's property may be found within the district; and, four, there is no statutory or maritime law bar to the attachment.

And conversely says, Aqua Stoli, a district court must vacate an attachment if the plaintiff fails to sustain his burden of showing that he has satisfied the requirements of Rule B and E.

The Court also outlined certain other limited circumstances which do not appear to be relevant here. Specifically, it outlined a circumstance where the defendant is subject to suit in a "convenient adjacent jurisdiction, and where the plaintiff could obtain in personam jurisdiction over the defendant in the district where the plaintiff is located, or the plaintiff has already obtained sufficient security for the potential judgment by attachment or otherwise."

Those circumstances, i.e., the limited circumstances, have no application in this case.

I conclude that the plaintiff has met the requirement that the defendant cannot be found within the district; that the defendant's property may be found within the district; and that there is no statutory or maritime law bar to the attachment. I consider, however, whether a valid prima facie admiralty claim against the defendant has been asserted.

Now, there is much discussion, and I suppose it will be a continuing discussion, as to how a district court is to determine whether there is a valid prima facie admiralty claim. I think it is fair to say that after Aqua Stoli, it cannot credibly be argued that there is a probability of success on

the merits type standard. But I really don't, in this case, have to spend too much time with whether it is something to be determined solely from the face of the pleadings or whether this Court can and should consider matters outside the four

corners of the pleading, because under either standard, I find that the plaintiff has alleged a valid prima facie admiralty claim.

I'm mindful of the dictates of supplemental Rule E(2)(a), that there must be at least enough particularity so that the plaintiff -- or, rather, the defendant can commence an investigation of the facts and frame a responsive pleading; and that this is a higher pleading requirement than the Rule 8(a) requirement.

Here, the plaintiff alleges that MWS is the alter ego of IOOI, but it does not simply leave it as a conclusory allegation. It goes on to allege that the reason it believes it is the alter ego is because IOOI dominates and disregards MWS's corporate form to the extent that MWS is actually carrying on IOOI's business and operations as if the same were its own. It further goes on to allege that MWS, acting as paying agent, acts as paying agent or arranges for other nonparties to satisfy the debts and obligations of IOOI.

It seems to me that is a sufficient allegation. If and to the extent it is not a sufficient allegation, I look to the declaration of Hara Anastasatou.

Now, the declaration referenced goes into the issue of common ownership and control, alleging that the two are a single economic entity. Some of the facts that are set forth there are consistent with alter ego, but they could also be consistent with one shareholder owning two separate corporations. There's nothing in law that prohibits a single shareholder from doing business through separate corporations, provided the separate corporate form is maintained.

But what I find impressive about the declaration is it gives considerable particularity and description to instances where MWS made a payment on behalf of IOOI, it gives chapter and verse, it gives the details, it gives the time, the place, and the circumstances, and it gives a number of examples. And so I find paragraphs 20 through 43 of the declaration to be of particular help and utility.

The prerequisites for piercing the corporate veil are as clear in federal maritime law as in shoreside law. That's a point that has been made in the Kirno Hill case; and it's clear that the veil will be pierced only if a corporation is used by another entity or individual to perpetrate a fraud or, the operative word being "or," was so dominated that its corporate form was disregarded and the notion that a way to prove veil piercing is by showing that the alleged alter ego so dominated and disregarded its alter ego's corporate form, that the alter ego is actually carrying on the controlling party's business

instead of its own, is an extremely well-recognized, well-established means of demonstrating corporate veil piercing.

I look specifically to pages 25 to 27 of Judge Wood's well-reasoned and thoughtful opinion in Tide Line, including the citation up to the factors outlined in William Passalacqua Builders v. Resnick.

Unlike Tide Line, of course, this is a case where the alter ego allegation is on the face of the complaint. Whether

I look at it in terms of the complaint or I look at it in terms of the complaint taking into account the plaintiff's submissions, as well as the defendant's submissions, and the argument presented here today, I conclude that there is a valid prima facie admiralty claim; that all other requirements of Rule B and E have been met; that there is not a limited circumstance, as outlined in Aqua Stoli, for vacating the attachment under the limited circumstances doctrine.

So I conclude that the plaintiff has, at this hearing, met each and every element of the plaintiff's burden; and, therefore, the motion to vacate the attachment is denied.

Is there anything further?

MS. PETERSON: No, your Honor.

MR. UNGER: No, your Honor.

THE COURT: Thank you all very much.

* * *

EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLORA MARITIME LTD.,

Plaintiff,

-against-

INTER ELTRA INTERNATIONAL GMBH, INTER ELTRA GROUP, INTER ELTRA GLOBAL STL, ELTRA-ZAREVODAR, MISHAN AGRO, ALPHAMATE LIMITED, AGROCOM TRADERS AND BROKERS OHG, AGROCOM BROKERS AND TRADERS OHG, RENE EIKEL, MICHAELA EIKEL, NATHALIE EIKEL, and ANDREY LYUMBIMOV,

Defendants.

06 Civ. 6372 (RMB)

ORDER

I. Background

On or about August 22, 2006, Flora Maritime Ltd. ("Plaintiff") filed a complaint ("Complaint") against Inter Eltra International GMBH ("Inter Eltra"), alleging that Inter Eltra breached a maritime contract (the "charter-party"), dated August 11, 2006, to ship a cargo of barley on Plaintiff's vessel, and seeking damages of $370,000 and "issuance of process of maritime attachment so that it may obtain security for its claims." (Complaint at 4-5.) On the same day, the Court ordered that process of maritime attachment be issued pursuant to Rule B of the Supplemental Rules of Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure ("Rule B"). (See Order dated Aug. 22, 2006.) On or about August 23, 2006, Plaintiff amended the Complaint to seek damages of $510,940. (See First Amended Verified Complaint dated Aug. 23, 2006.)

On or about September 29, 2006, Plaintiff, with permission of the Court (see Memo Endorsed letter dated Sept. 29, 2006), filed a Second Amended Verified Complaint which added as a defendant Agrocom Traders and Brokers OHG and Agrocom Brokers and Traders OHG ("Agrocom"). (See Second Amended Verified Complaint dated Sept. 29, 2006.) On or about March 12, 2007, Plaintiff, again with permission of the Court (see Memo Endorsed letter dated Mar. 7, 2007), filed a Third Amended Verified Complaint which added as defendants Inter Eltra Group, Inter Eltra Global SRL, Eltra-Zarevodar, Mishan Agro, Alphamate Limited, Rene Eikel, Michaela Eikel, Nathalie Eikel, and Andrey Lyumbimov. (See Third Amended Verified Complaint ("Third Am. Compl."), dated Mar. 12, 2007.) The Second and Third Amended Verified Complaints state that Plaintiff "has a valid in personam claim" against the added defendants "based upon alter ego liability." (Third Am. Compl. at 8.) On September 29, 2007, and again on March 13, 2007, the Court ordered that process of maritime attachment be issued pursuant to Rule B against all defendants. (See Orders dated Sept. 29, 2006; Mar. 13, 2007.)

By Order to Show Cause, dated May 2, 2007, defendants Agrocom, Alphamate Limited, Rene Eikel, Michaela Eikel, Nathalie Eikel, and Andrey Lyubimov ("Defendants" or "Moving Defendants") filed a motion to vacate the maritime attachments against them ("Motion to Vacate") pursuant to Rule E of the Supplemental Rules of Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure ("Rule E"), arguing that (1) "[P]laintiff's alter ego allegations are too conclusory, too superficial and too lacking in evidentiary substance to support admiralty jurisdiction" and (2) the Third Amended Verified Complaint and the Order for Issuance of a Process of Maritime Attachment dated March 13, 2007 ("March 13 Order"), "are

defective in several crucial respects." (Def. Mem. at 1, 3, 16 ("those documents do not identify all of the moving defendants" and "there is no defendant GUJARAT in this case").)[1]

On or about May 10, 2007, Plaintiff opposed Defendants' Motion to Vacate, arguing that "Plaintiff has adequately alleged a prima facie alter-ego claim against the Moving Defendants," whose arguments to the contrary "ignore the recent case law of this district and are unavailing." (Pl. Mem. at 3.)[2]

On May 10, 2007, the Court held a post-attachment hearing pursuant to Rule E. (See Hearing Transcript, May 10, 2007.)

For the reasons stated below, Defendants' Motion to Vacate is denied.

II. Legal Standard

Rule B is "a relatively broad maritime attachment rule, under which the attachment is quite easily obtained," and a maritime attachment "may be vacated only in certain limited circumstances." Aqua Stoli Shipping Ltd. v. Gardner Smith Pty. Ltd., 460 F.3d 434, 443-45 (2d Cir. 2006). An attachment should not be vacated if the plaintiff shows that it "has satisfied the requirements of Rules B and E," including, among other things, that "it has a valid prima facie admiralty claim against the defendant." Id. at 445. A plaintiff "need not provide any supporting evidence" to oppose a motion to vacate an attachment, "its complaint should suffice," and "the basis of defendant's argument" to vacate an attachment "may [not] be that plaintiff has not provided sufficient evidence of such a claim." Tide Line, Inc. v. Eastrade Commodities, Inc., No. 06 Civ. 1979, 2006 U.S. Dist. LEXIS 95870, at *16, 22 (S.D.N.Y. Aug. 15, 2006).

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[1] Defendants' memorandum of law states that Plaintiff incorrectly sued Defendant Andrey Lyubimov as "Andrey Lyumbimov." (Def. Mem. at 1.)

[2] Plaintiff does not address Defendants' claim that the Third Amended Verified Complaint and March 13 Order contain defects.

III. Analysis

(1) Alter Ego Claims

Defendants argue that the Third Amended Verified Complaint "does not assert any involvement by the moving defendants in the charter-party," and "[P]laintiff has offered no evidence of any kind to support its alter ego allegations involving the moving defendants." (Def. Mem. at 10, 13 (emphasis original).) Plaintiff responds that it has "properly alleged a legally sufficient claim for alter-ego liability against the moving defendants" and "has set forth facts upon which its claim is based." (Pl. Mem. at 11.)

To establish a prima facie admiralty claim, Rule E requires that a complaint "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Fed. R. Civ. P. Supp. Rule E(2)(a).

The Third Amended Verified Complaint cites several grounds for Plaintiff's claim that Defendants are alter egos of Inter Eltra, including, among others, "such unity of ownership" that "the corporate form of [Inter Eltra] has been disregarded"; "overlapping ownership, management, personnel and purposes" such that Inter Eltra and Defendants "did not operate at arms length"; "common addresses [and] common contact information"; and "intermingling of funds." (Third Am. Compl. at 7-8.) These factors are "among the list of factors a court may consider when alter ego status has been pled, and are sufficient to state a valid admiralty claim." SPL Shipping Ltd. v. Gujarat Cheminex Ltd., 06 Civ. 15375, 2007 U.S. Dist. LEXIS 18562, at *11 (S.D.N.Y. Mar. 15, 2007); see also Wm. Passalacqua Builders v. Resnick Developers S., 933 F.2d 131, 139 (2d Cir. 1991). Defendants "can hardly argue that [they] ha[ve] been unable to commence an investigation of the facts and frame a responsive pleading, because [they] ha[ve]

already done both." Wajilam Exp. (Singapore) Pte. Ltd. v. ATL Shipping Ltd., 475 F. Supp. 2d 275, 282 (S.D.N.Y. 2006).

Defendants' argument that Plaintiff has failed to offer "evidence of any kind to support its alter ego allegations" is unpersuasive. (See Def. Mem. at 13.) Among other things, Plaintiff submitted a number of exhibits in support of its alter ego claims, including financial statements and other documents which indicate overlapping ownership and management among Inter Eltra and the Moving Defendants. (See Plaintiff's Declaration in Opposition to Defendants' Motion, Ex. 3-4.) Defendants' "arguments go to the ultimate merits of the claims," World Reach Shipping Ltd. v. Indus. Carriers Inc., No. 06 Civ. 3756, 2006 U.S. Dist. LEXIS 83224, at *7 (S.D.N.Y. Nov. 9, 2006), while, at this stage, the Court must "look only to Plaintiff's pleadings, and not to any evidence submitted by the parties, to determine whether Plaintiff has made a legally sufficient claim." SPL Shipping Ltd., 2007 U.S. Dist. LEXIS 18562, at *10. In conformity with the requirements of Rule B and E, Plaintiff has "allege[d] sufficient facts to support an inference" of alter ego liability. Wajilam Exp. (Singapore) Pte. Ltd., 475 F. Supp. 2d at 283.

(2) Defective Pleadings

Defendants argue that "in paragraph Forty-fifth of its Third Amended Verified Complaint," Plaintiff states that Defendants "'are the alter-egos of Defendant GUJARAT'," although "there is no defendant in this case named GUJARAT." (Def. Mem. at 16-17.) Defendants argue that "[a]lthough this undoubtedly is a typographical error," it occurs "in the very paragraph asserting the ultimate allegation of alter ego liability to sustain maritime jurisdiction over the moving defendants." (Def. Mem. at 17.) Defendants also state that the

March 13 Order "does not name [all] of the moving defendants." (Def. Mem. at 16.) Plaintiff does not dispute Defendants' arguments that Plaintiff's submissions contain defects.

Pursuant to the "liberal policy in non-habeas civil proceedings of allowing amendments to correct a defective pleading," the Court will allow Plaintiff ten days from the date of this Order to correct these errors by filing a Fourth Amended Verified Complaint, along with a request for an amended Order for Issuance of a Process of Maritime Attachment pursuant to Rule B. See Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 815 (2d Cir. 2000).

IV. Conclusion and Order

For the reasons stated herein, Defendants' Motion to Vacate is denied. Defendants' assets shall remain attached per the terms of the March 13 Order, which is construed to apply to all named defendants. Plaintiff shall file a Fourth Amended Verified Complaint and a request for an amended Order for Issuance of a Process of Maritime Attachment in accordance with the determinations in this Order, on or before July 5, 2007.

Dated: New York, New York
June 21, 2007

RMB

RICHARD M. BERMAN, U.S.D.J.

EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GOOD CHALLENGER NAVAGANTE S.A.,

Plaintiff,

-v-

METALEXPORTIMPORT S.A. and S.C. METALEXPORTIMPORT S.A.,

Defendants.

Case No. 06-CV-1847 (KMK)

ORDER

KENNETH M. KARAS, District Judge:

Having considered the submissions of the parties, and after conducting oral argument on July 6, 2006, IT IS HEREBY ORDERED THAT:

Defendant's Motion to Vacate the attachment of funds held by Plaintiff is DENIED.

The Court will not recite the facts, as it is assumed that the Parties are familiar with the facts of the case.

"Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules." Supplemental Admiralty & Maritime R. E(4)(f). At such a hearing, Plaintiff bears the burden of proof. *See Ulises Shipping Corp. v. FAL Shipping Co. Ltd.*, 415 F. Supp. 2d 318, 322 (S.D.N.Y. 2006). "'The post-arrest hearing is not intended to resolve definitively the dispute between the parties, but only to make a preliminary determination whether there were reasonable grounds for issuing the arrest warrant.' Therefore, the plaintiff must present evidence showing that the attachment was reasonable." *Id.* at 322-23 (quoting *Solazar v. Atlantic Sun*, 881 F.2d 73, 79-80

(3rd Cir. 1989)). Specifically, the plaintiff must demonstrate either that the attachment is necessary for the plaintiff to obtain jurisdiction in a convenient district, or that the plaintiff needs the security of the attachment to satisfy any judgment it may win in the underlying action. *Id.* at 323.

Timeliness

Defendant first argues that Plaintiff's attempts to attach the remaining funds awarded in the 1983 arbitration are untimely. Specifically, Defendant argues that under the United Nations Convention on Recognition and Enforcement of Foreign Arbitration Awards ("Convention"), the arbitration award cannot be enforced in the United States, as more than three years have passed since it was awarded. *See* 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration."). According to Defendant, this dispute falls under the Convention because Good Challenger seeks enforcement or recognition of an arbitration award in a nation other than the nation where the award was made. *See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 196 (2d Cir. 1999) (citing Convention).

In this case, the arbitration award was originally granted in 1983. However, Plaintiff's Complaint seeks to enforce the judgment of the arbitration award, granted by the English court in 1993 and served on S.C. Metalexportimport on August 15, 2001, with permission from the English courts. This judgment was entered on January 17, 2003. A further award of costs was ordered in 2005. Section 207, however, "applies only to 'enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards,'" which are

governed by principles of comity. *Sarhank Group v. Oracle Corp.*, No. 01 Civ. 1285, 2004 WL 324881, at *3 (S.D.N.Y. Feb. 19, 2004). Therefore, the time limitations for Plaintiff's action would not be governed by § 207, and instead, would be governed by New York's statute of limitations.

Defendant, however, argues that the statute of limitations to enforce the English judgment has run. While the New York statute of limitations is twenty years, N.Y. C.P.L.R. § 211(b), New York's borrowing statute dictates that where the Plaintiff is not a resident of New York, the Court should apply whichever statute of limitations is shorter after comparing New York and the jurisdiction where the action arose. *See* N.Y. C.P.L.R. § 202. Both the arbitration award and the judgment Plaintiff seek to enforce were obtained in England, thus, the six-year English statute of limitations applies. As the judgment was entered in England in 2003, this statute of limitations has not yet run.

Nevertheless, Defendant argues that even if the statute of limitations has not run, Plaintiff's action should be barred by laches. In maritime actions, "the matter should not be determined merely by . . . the statute of limitations. The equities of the parties must be considered as well." *Larios v. Victory Carriers, Inc.*, 316 F.2d 63, 66 (2d Cir. 1963). Therefore, "the court must weigh the legitimacy of [Plaintiff's] excuse, the inference to be drawn from the expiration of the state statute, and the length of the delay, along with evidence as to prejudice if the defendant comes forward with any." *Id.* at 66-67. Plaintiff has the burden of persuasion as to the reasons for its own delay as well as the lack of prejudice to Defendant. *Id.*

Defendant points to the ten-year gap between the 1983 arbitration award and the 1993 English judgment, as well as Plaintiff's eight-year delay in serving the English judgment, and

argues that it was prejudiced by these delays. Defendant specifically points to the interest accrued during this period of delay. Plaintiff asserts that there was no prejudice to Defendant due to the delay, as Defendant was aware of, and contested, all of the enforcement actions against Defendant. (Pl.'s Opp'n 14) Defendant's objection does not appear to be an appropriate factor in measuring prejudice. Instead, in considering laches, courts tend to look at whether the defendant would be prejudiced in the litigation. *See e.g. Hill v. W. Bruns & Co.*, 498 F.2d 565, 568-69 (2d Cir. 1974) (considering whether records could have been lost due to the delay). As accrued interest is a natural effect of a judgment which goes unsatisfied for a long period of time, this cannot act to invalidate the attachment.

Enforceability of the English Judgment

Defendant argues that the 2001 English judgment should not be enforced because of a 1995 judgment by a Romanian court that the 1983 arbitration award should not be enforced in Romania, which was appealed to and affirmed by the Romanian High Court of Justice in 1998. (Def.'s Ex. 2, 3, 4) In New York, a foreign judgment "need not be recognized if . . . [it] conflicts with another final and conclusive judgment." N.Y. C.P.L.R. § 5304(b)(5); *see also Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc.*, 157 F. Supp. 2d 245, 248 (S.D.N.Y. 2001). However, while Defendant argues that the Romanian court meant that the award was barred under English law, the Bucharest Commercial Court itself stated, "[T]hus, the request of claimant to approve the enforcement *in Romania* of the arbitration decision pronounced by the London Maritime Arbitration . . . is rejected . . . ." (Def.'s Ex. 2 at 5 (emphasis added); *see also* Ex. 3, 4 (echoing same)) The judgment entered in English court considered only the enforcement of the arbitration award under English law, and in doing so rejected *dicta* in the Romanian court

decision suggesting that the action was time-barred under English law. Thus, each decision actually considered whether the arbitration award could be enforced under the laws of the country in which the court sat, and thus they do not conflict.

Even if the two judgments did conflict, "[i]t is well settled that the last-in-time rule should be applied to conflicting sister-state judgments." *Byblos Bank Europe, S.A. v. Syrketi*, No. 2006 N.Y. Slip Op. 26179, 2006 WL 1222351, at *4 (N.Y. Sup. Ct. 2006). Even if, as Defendant asserts, the English Court would have had to apply res judicata to the prior judgment, (which is not completely evident under New York law, *see Byblos*, 2006 WL 1222351, at *5) there is no evidence that the English court did not do so, even if it did not specifically mention res judicata.

Either way, this Court is only charged with determining whether there were "reasonable grounds" for issuing an attachment. *See Ullises Shipping*, 416 F. Supp. 2d at 322. As Plaintiff has demonstrated the necessity of such an attachment, Defendant's res judicata arguments are best considered on a motion to dismiss, and not at this stage, where only the validity of the attachment itself is at issue.

Validity of the PMAG at Time Served

Plaintiff served a copy of the PMAG issued on March 9, 2006 on Citibank every day afterwards, in accordance with *Reibor Int'l Ltd v. Cargo Carriers Ltd.*, 759 F.2d 262 (2d Cir. 1985). Defendant argues that the PMAG became void on March 9 since Citibank did not hold any of Defendant's money on that date, and because Plaintiff did not obtain a new PMAG before the April 6 transfer was received by Citibank.

There is no Second Circuit decision which specifically addresses whether a new PMAG

needs to be issued by the Clerk for every day of a Maritime Attachment until the day the financial institution has the property. Cases in this District have, however, held that *Reibor*'s requirement that service and attachment be separated by "just a few hours," *Reibor*, 759 F.2d at 267, permits service and attachment to both be in the same day, particularly where, as here, the garnishee's bank agrees to accept fax service of the PMAG once per business day and that such service would be effective for the remainder of that day. *See Ulises Shipping Corp.*, 415 F. Supp. 2d at 328; *Ythan Ltd. v. Americas Bulk Trans. Ltd.*, 336 F. Supp. 2d 305, 307 (S.D.N.Y. 2004). Defendant argues that these cases were wrongly decided, however, the Court is unpersuaded.

Further, it was not improper for Plaintiff to authorize Citibank to attach the funds under a slightly different name than that contained in the PMAG. This case is easily distinguishable from *Contichem v. Parsons Shipping*, 229 F.3d 426, 435 (2d Cir. 2000), cited by Defendant. The party seeking attachment in *Contichem* manipulated the use of temporary restraining orders and PMAGs to stop its own transfer to the garnishee. Here, Plaintiff simply told Citibank to attach funds Plaintiff honestly believed belonged to the party against whom they had obtained a PMAG. "Admiralty has not permitted technical niceties to defeat rights of foreign attachment." *Esso Standard (Switzerland) v. The Steamship Arosa Sun*, 184 F. Supp. 124, 128 (S.D.N.Y. 1960), and then expeditiously amended its Complaint to include the additional entity. Therefore, the attachment is not to be vacated on grounds of faulty service.

Ownership of the Transferred Property

Defendant argues that the second transfer was not yet its property, as it was in transit from the transferor to Defendant. This question was already resolved in *Noble Shipping, Inc. v. Euro-Maritime Chartering Ltd.*, 2003 WL 23021974, at *3 (S.D.N.Y. 2003), which holds that it is

proper to attach both transfers from and to the defendant. *See also Vanvaship Maritime Ltd. v. Shivnath Rai Harnarain (India) Ltd.*, No. 06 Civ. 1849, 2006 WL 1030227 (S.D.N.Y. Apr. 20, 2006); *Yihan Ltd.*, 336 F. Supp. 2d at 309. The attachment thus should not be vacated on this ground.

In addition, Defendant argues that the attached property was "after-acquired," and therefore ineligible for Rule B attachment. *See Contichem*, 229 F.3d at 433 (recognizing "well-established prohibition against maritime attachments of after-acquired property"). However, where the plaintiff and the garnishee bank agree to have service be effective for the entire day, as in this case, the transfer of funds is not "after" the service of process, and therefore not "after-acquired." *See Yihan*, 336 F Supp. 2d at 307-08. Thus, Plaintiff was entitled to continue serving the writ of attachment until it obtained the full amount allowed by the PMAG.

Forum Non Conveniens and Jurisdiction

Defendant argues that the attachment should be vacated on grounds of forum non convieniens. However, "[t]he very nature of Rule B assumes that the defendant cannot be found in this district. *Forum non conveniens* concerns do not automatically trump . . . Rule B. . . . If complaints of inconvenience could remove an action from this forum, then the Rule would be rendered hollow." *Linea Naviera de Cabataje, C.A. v. Mar Caribe de Navegacion, C.A.*, 169 F. Supp. 2d 1341, 1352-53 (M.D. Fla. 2001). Thus, the attachment will also not be vacated on forum non conveniens. Further, as Rule B assumes that there is no personal or *quasi in rem* jurisdiction over the defendant, *c.f. Metal Transp. Corp. v. Account No. 232-2-405842 at Chase Manhattan Bank, N.A., In Rem*, No. 89 Civ. 8505, 1990 WL 103987, at *1 (S.D.N.Y. July 16, 1990) (holding that where personal jurisdiction over defendant exists, there are grounds to vacate

maritime attachment), there is no jurisdictional problem with the attachment. While personal jurisdiction would be required for a recovery greater than that available through the attachment, *see Orbis Marine Enters. v. TEC Marine Lines, Ltd.*, 692 F. Supp. 280, 285 (S.D.N.Y. 1988), Plaintiff does not seek such relief here and thus, personal jurisdiction is not necessary.

SO ORDERED.

Dated: July 17, 2006
New York, New York

KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

EXHIBIT 4

Transcript of the hearing

81FGMTCC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MTC LEVANT-LINE GmbH, BREMEN,

Plaintiff,

v. 06 CV 3506 (JGK)

PAN-PACIFIC INTERNATIONAL & TRANSPORTATION CO., LTD., et al.,

Defendants.

----------x

New York, N.Y.
January 15, 2008
2:45 p.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

CHALOS, O'CONNOR & DUFFY LLP
Attorneys for Plaintiff
BY: OWEN FRANCIS DUFFY, III

SEWARD & KISSEL LLP
Attorneys for Defendants Finecom Shipping Ltd.
BY: PAULA ODYSSEOS
BRUCE G. PAULSEN

81FGMTCC

(Case called)
(In open court)
THE DEPUTY CLERK: Will counsel please state their appearances for the record.
MR. DUFFY: Your Honor, Owen Duffy, Chalos, O'Connor & Duffy, for the plaintiff MTC Levant.
MR. PAULSEN: Your Honor, Bruce Paulsen of Seward & Kissel for Finecom, and with me is Paula Odysseos.
THE COURT: All right. I've read the papers. This is a motion to vacate the attachment. I'll listen to the parties. I've read the papers.
MR. PAULSEN: Do you have any particular order, your Honor?

THE COURT: No. I would assume you'd go first but --
MR. PAULSEN: Yeah. Why don't I go ahead.
Your Honor, on behalf of Finecom, the fact that it hit us between the eyes really when we received the plaintiff's answering papers in response to our motion was the fact that an arbitration award has already been granted in London and not against our client. The award is against --
THE COURT: Did it really come as a shock to you? Wouldn't you have received some notice if your client was actually a party to the arbitration?
MR. PAULSEN: Yes. And our client received notice. Finecom is not a party and didn't participate and is now being

sought to --
THE COURT: And your client wasn't a party to the charter party, so it --
MR. PAULSEN: That's correct.
THE COURT: -- didn't come at a complete shock to you. I mean, you were able to recoil from the shock between the eyes.
MR. PAULSEN: Well, indeed, your Honor. I guess what the surprise was was that security was being sought in aid of a pending London arbitration, and we did not know that an award had come down. And in fact, we're now looking at what is more akin to an enforcement or a confirmation of an award than for security in aid of a pending arbitration that has concluded that did not include our party, that did not seek to include our party.
THE COURT: Okay. Let me step back just for a second. And all of you are experts in this area, but the complaint is a maritime claim against Pan-Pacific for breach of the charter party, a maritime contract, first claim.
Second claim, an alleged alter ego claim seeking to hold the other defendants liable for the liability of Pan-Pacific, also alleged to be a maritime claim. Had there been no arbitration clause at all, the plaintiff could have successfully gotten a maritime attachment, a Rule B attachment, based upon a prima facie case of an admiralty claim against the

other party to the charter party and a claim against the alleged alter egos as being liable in admiralty law as alter egos of the primary party, putting aside the arbitration for a moment. Isn't that right?
MR. PAULSEN: They could have taken any sort of action --
THE COURT: Well, including bringing a maritime action in this court against the party to the charter party and the alleged alter egos.
MR. PAULSEN: There certainly would be no stopping them from doing so.
THE COURT: And seeking a Rule B attachment in aid of the maritime claim. Right?
MR. PAULSEN: As security for the maritime claim.
THE COURT: As security for the maritime claim. Right?
MR. PAULSEN: Correct.
THE COURT: The first claim in this case alleges a

maritime claim and also alleges that there is an arbitration. I mean, the complaint itself alleges only an arbitration against Pan-Pacific and asks that the Court await, or language to that effect, the -- it says, Plaintiff has commenced an arbitration proceeding in London against Pan-Pacific and reserves its right to arbitrate the substantive matters herein before the LMAA arbitration panel. That's part of its claim

for breach of -- one paragraph of its breach of contract claim against Pan-Pacific.

So then the question becomes if everything that I laid out for you before would allow the plaintiff to seek and obtain a Rule B attachment against the alleged alter egos, what is it about the fact that there was an arbitration in London that now precludes the Court from granting the attachment or requires the Court to vacate the attachment?

MR. PAULSEN: In this connection, your Honor, I think we are in fairly new territory. I suppose I could take what you're saying and say that they haven't said in their complaint that they're going to bring an action against the alter ego somewhere else, perhaps in China --

THE COURT: Well, why isn't this action an action against the alter ego, the second claim?

MR. PAULSEN: It is an action, but to paraphrase Judge Wood in Tide Line, where in that case in both of her decisions from August of '06, you had a situation where the London arbitration was pending, but the alter egos were not named as parties.

THE COURT: Right.

MR. PAULSEN: And the larger question is, well, how do we deal with that.

THE COURT: Okay. I realize she raised the question. It wasn't dispositive. She maintained the attachment against

the alter ego. She raised it as a question. It's an interesting question, which I now turn to you for an answer, some rationale, if you will, for why a complaint in this court which on its face appears to allege an admiralty claim against Finecom as an alter ego of the contracting party to a maritime contract, what is there out there that says you can't grant a Rule B attachment? What's the principle of law? What's the issue that precludes the attachment?

You say, well, they may bring an action somewhere. Who knows? London, wherever. They brought this action. They brought this maritime action within the admiralty jurisdiction of the court alleging that your client is the alter ego of the party to the charter party and that you're liable on that maritime claim.

Now, I assume this action is not going to be brought in London or somewhere else. It's brought here in this district. That's the second claim. And so it will proceed, an action against your client alleging that your client is liable for the liability under the first claim. And it's a maritime action, and it will go forward.

MR. PAULSEN: My understanding of the historical purpose of Rule B, as set forth in Aqua Stoli and a number of the other decisions on the subject, is that its purpose,

because of the transitory nature of shipping, is to provide a mechanism to obtain security for a maritime claim.

THE COURT: Right.

MR. PAULSEN: So we have that mechanism being invoked here ostensibly in aid of a London arbitration which has already been --

THE COURT: Why is the second claim in aid of the London arbitration? The second claim against your client is an alter ego claim, maritime claim which says your client, the defendant, is liable to the plaintiff on a maritime claim based upon the theory of alter ego, and the Rule B attachment is there in order to provide the plaintiff with security against an absent defendant who cannot be found within this district. And it seems to fall squarely within the purposes of a Rule B attachment, namely, security for a maritime claim.

MR. PAULSEN: A maritime claim here?

THE COURT: Here, right, in this court, plaintiff against defendant, maritime claim pending in this court, I mean, which is why I began with the question why does the fact that there is an arbitration in London between the parties to the first claim mean that somehow the Court is deprived of the statutory basis for a Rule B attachment in connection with the second claim? What's the legal principle?

MR. PAULSEN: I would reiterate that my understanding is that the principle is to obtain security, and I suppose historically a Rule B attachment in New York has been in aid of a proceeding elsewhere, almost always London, sometimes

somewhere else.

THE COURT: But it doesn't have to be, does it?

MR. PAULSEN: I've got to say that issue has not been briefed, and as I stand here --

THE COURT: Well, sure it has. I mean, that's really the gist of the disagreement between the parties.

Let me ask you another question. You have raised in your papers the New York convention.

MR. PAULSEN: Right.

THE COURT: And you say that the New York convention would prevent, at least as I read your papers, any -- would preclude the second cause of action. And I don't see any cases that say that the New York convention would preclude the second cause of action, namely, an alter ego claim against Finecom, and I don't really see why that would be true.

MR. PAULSEN: Again, our brief was couched on the notion that this action, both causes of action, including the prayer for relief at the end, are based on an attempt to obtain security in aid of a London arbitration that has concluded, and this was, in effect, an attempt to confirm a foreign arbitrable award in New York which would make the convention applicable. And there's been no evidence in this forum of an agreement to arbitrate between the parties. I mean, that's the thrust of that argument.

THE COURT: It would not be uncommon, when you try and

force the results of an arbitration award against an alter ego, for the alter ego to be a nonparty to the arbitration.

MR. PAULSEN: Well, the Second Circuit in the Orion case indicated that seeking to pierce the veil in a confirmation phase is inappropriate, and English law supports that.

THE COURT: But the Second Circuit in Orion also said you can have another cause of action against the alter ego to attempt to enforce the arbitration. They seem to say in that same proceeding to enforce the arbitration award. So they left open the possibility of going out and suing the alter ego for the arbitration award. They explicitly left that open.

They just had a problem with what they thought -- what the Court of Appeals said was a straightforward action to enforce the arbitration award and to include both the party to the arbitration award and the alter ego.

And so I come back to this complaint and, if anything, the second cause of action doesn't purport to be based on somehow an enforcement of the arbitration award as opposed to an action against the alter ego based on maritime law such that they are liable for the breach of the maritime contract as the alter egos of Pan-Pacific Transportation.

Now, that may well leave open the issue of are you bound by the arbitration award, or does the plaintiff have to prove in this case both the breach of the contract and your

alter ego liability. Those are interesting questions. Perhaps that was what Judge Wood was getting at in the issues that she raised, but she said, okay, you can file an amended complaint alleging alter ego liability. And so they did.

MR. PAULSEN: Right.

THE COURT: And what the eventual scope and the proof of that claim is doesn't have to be decided now. Why isn't it perfectly right that they have alleged a prima facie admiralty claim for which they get a Rule B attachment and now you all can go out and prove whatever has to be proven with respect to their allegations against your client?

MR. PAULSEN: If I could just read briefly from the prayer for relief in the complaint: Notwithstanding the fact that the substantive liability of the plaintiff Levant for the alleged breach of the maritime contract will be determined by a panel of maritime arbitrators in London, England, there are now or will be during the pendency of this action certain assets belonging to the defendants... and so on and so forth, and goes forth to seek relief in attachment under Rule B and so on and so forth.

So I'm not so sure that at least the plaintiff has couched this complaint in the manner that you're reading and certainly not the way I read it.

Now, it's true that Judge Wood -- and I'm not seeing the language. Here we go. It is described on page *51 of the

first decision in Tide Line where she described a larger issue, which said: Which, although it does not in and of itself require that the attachment be vacated, poses a problem for the unfolding of this action. And you're right, she doesn't go on

and say much more about it beyond that.
I think that in this case, that larger question is even larger, since there is no manner in this way that our client could be brought into the London arbitration. It's over. It's done.
THE COURT: So, what, I accept the proposition -- and the complaint was not ambiguous on the subject. The complaint made it clear that the plaintiff had brought an arbitration in London against Pan-Pacific. The complaint never said that the plaintiff brought an arbitration against the other parties.
MR. PAULSEN: And the same is true in Tide Line. It was the allegations of the complaint that described the arbitration in London as not being against the nonparties.
THE COURT: Is there any case that has dismissed or vacated or refused to grant a Rule B attachment against an alleged alter ego of a party to an arbitration which involved an admiralty claim?
MR. PAULSEN: Where there already has been an award?
THE COURT: Either way, where there's been an award or while the arbitration is going on.
MR. PAULSEN: Could you read the question back? I'm

sorry.
THE COURT: Sure. Is there any case which a court vacated a Rule B attachment or refused to grant a Rule B attachment because the party against whom the attachment was sought was alleged to be an alter ego of a party to an arbitration proceeding or was not a party to an arbitration proceeding?
In other words, the result you're asking me to reach, is there any court which has done that based upon the fact that you can't have a Rule B attachment against a nonparty to an arbitration, you can't have a prima facie case of alleged alter ego liability when that alter ego was not itself a party to the arbitration.
MR. PAULSEN: I know of no ruling --
THE COURT: Okay.
MR. PAULSEN: -- or contract, for that matter.
THE COURT: There are several cases in this district which have allowed such Rule B attachments.
MR. PAULSEN: Maybe I'm reading your question a little bit too far, but I know of now no cases that would answer your question in that manner.
THE COURT: Judge Karas' case allowed Rule B attachment against an alter ego.
MR. PAULSEN: That was a nonparty, but that was where the arbitration was pending.

THE COURT: What difference does that make?
MR. PAULSEN: They could bring that alter ego into the arbitration, if need be, and obtain an award.
THE COURT: Judge Karas wasn't clear, if I recall it right, that it was so clear that you could bring a nonparty in. I mean, there's Second Circuit law that says you can get a nonparty in, but not clear that a London arbitrator -- and the parties weren't clear. I mean, the parties said that they weren't clear before Judge Karas and --

MR. PAULSEN: That's my recollection.
THE COURT: And then he cited two other decisions from other judges in the district which also have given Rule B attachments.
MR. PAULSEN: Right. Although I don't think -- in fact, I'm reasonably certain that in none of those cases was the arbitration finished. They were pending, which is the usual scenario. There are certainly a number of decisions out there and quite a number of alter ego decisions just in the last two years.
THE COURT: But what I'm trying to understand -- and I realize that all of you regularly deal with these things and are the experts in the field -- is why it makes a difference, why the principle is not pretty straightforward that alleged alter ego liability on the ultimate contract in a maritime claim states a prima facie claim and you can have a Rule B

attachment.
The Rule B attachments aren't limited to -- the anchor for a Rule B attachment is a maritime claim. It's not an arbitration. If the parties never had an arbitration, if it didn't include an arbitration provision, they could still have a Rule B attachment, and the case just proceeds here. And what I'm having trouble seeing is why it makes any difference at all to the language of the Rule B attachment and the purpose of the Rule B attachment that two of the parties in the case are parties to the London arbitration.
As I said, Rule B isn't limited to arbitrations, and so it's hard to see why the existence of an arbitration should limit the court's power to issue an attachment under Rule B. There's nothing in the language of Rule B that suggests that.
MR. PAULSEN: What I'd suggest is that it would be an expansion of the traditional scope of Rule B as security.
THE COURT: But it's security for a maritime claim, irrespective of whether there's an arbitration.
MR. PAULSEN: That is correct.
THE COURT: Okay. Mr. Duffy.
MR. DUFFY: Your Honor, just to address the arbitration point, if I understood you correctly, the Judge Karas case you were referring to was the T&O Shipping case?
THE COURT: Right.
MR. DUFFY: I think there's been countless cases where

courts have allowed the Rule B maritime attachment for a maritime claim in aid of London arbitration. And I think one particular point that needs to be emphasized in this case is when we filed this complaint in February -- this was an amended complaint in February of 2007 -- we didn't have an arbitration award, and we didn't have even the arbitration initiated in that instance.
In March we attached $150,000 worth of the defendant Finecom's funds. We gave them notice of the attachment. I didn't receive any response in March, April, May, June. In the meantime, my clients went ahead with the arbitration. The arbitrators sent out the notices to the defendant, and eventually he issued an arbitration award.
Now go back --

THE COURT: The defendant Pan-Pacific?
MR. DUFFY: The defendant Pan-Pacific. And you go back to the underlying basis of a Rule B maritime attachment as set forth in Aqua Stoli, but it goes back to the Swift & Packers case from the Supreme Court. It's to establish jurisdiction and to establish a fund for securities so that an eventual award --
THE COURT: It's not "and." It's "or."
MR. DUFFY: "Or," yes, your Honor. Or a fund from which an eventual judgment can be satisfied.
Now, that's what we did in this case. We established

the attachment. We established jurisdiction over their property to the amount of $150,000. We have an arbitration award. What he's dealing with is kind of separate from what I'm dealing with. I mean, he's saying right now we shouldn't have our money attached because we weren't a party to the arbitration. We have a maritime claim against them. Yes, it is a valid maritime attachment.
I may have to go to the next step and take the arbitration award and come back to the court and say would you please confirm this award on notice and everything. They may object to it. Then, once I get the arbitration award, I have to prove the case that they are, in fact, the alter ego.
But right now we're at a Rule E hearing where they're just trying to determine whether or not the attachment should be vacated or not, and we're limited to the four Aqua Stoli factors, which goes back to the prima facie claim, not found within the district, property of the defendant. We have all of those.
The only issue that I see here is whether or not we have a valid prima facie claim against them, and I would submit to you that we do. And do you want me to keep going on this, your Honor?
THE COURT: Well, the prima facie claim is the claim that's set out in the second claim for relief in your amended complaint --

MR. DUFFY: Yes, your Honor.
THE COURT: -- it's alter ego liability.
MR. DUFFY: Yes, your Honor.
THE COURT: And how you'll eventually prove that is not really before me at the moment. Isn't that right?
MR. DUFFY: That's correct, your Honor. I know that Judge Wood raised an issue about that, but I believe there's at least two other cases. One that I'm very familiar with was the Cecil Maritima case where the court just said, okay, you've overcome the -- in that case he didn't apply the reasonable grounds, but he said you maintained the attachment. Now go and prove your case.
And I believe there was another one that was World Shipping where the court said right now I'm at a Rule E hearing. I look at this under either the reasonable grounds or the prima facie case. What happens after that, you go out and do your discovery, and whether or not you can prove your case for an alter ego liability is another thing, but right now we're here at a different juncture in the case.

THE COURT: How do you eventually, with respect to count two -- I have to look at count two and ask whether that states a prima facie case for an admiralty claim. Right?
MR. DUFFY: Uh-huh.
THE COURT: -- sufficient to maintain the attachment against Finecom. Right?

MR. DUFFY: That's correct. There's two counts in the Southern District.
THE COURT: I know. One is reasonable grounds. One is --
MR. DUFFY: Yes. So I won't go into all of that. I assume you're familiar with it. And I would note that I was before you once before with the other defendant Pan-Pacific, and you did apply a reasonable grounds test in that case. And I understand your logic on that. I would also ask you to recognize that on the same day, Judge Buchwald issued a decision that applied the prima facie case.
THE COURT: I think the cases are more in favor of prima facie these days. Go ahead.
MR. DUFFY: That's my argument to your Honor, but I believe even in this case under the reasonable grounds standard, we still meet the burden in this case.
THE COURT: Okay. How do you expect to eventually prove count two?
MR. DUFFY: I'm going to have to get a little creative on discovery, and if they don't want to defend the discovery, I have their property here. And then I believe they have an impetus to participate in discovery. They can't just ignore it. I believe the words to -- I'm trying to remember the judge's name, but I forget it. But it was in the Cecil Maritima case. I believe it was Judge Stein said to me you've

got to deal with this. You just can't let it go away, and I had to deal with it. I was on the defendant's side that time. No, it wasn't Judge Stein. It was Judge Hellerstein.
THE COURT: My recollection, with respect to the other defendant who was dismissed, is that you eventually agreed to that, that you really did have the wrong defendant in that case.
MR. DUFFY: We dismissed him, your Honor. We had a different view of how this whole thing played out, and a lot of it wasn't clear to us until this fellow from Pan-Pacific came in. And he wound up presenting evidence which this Court characterized as persuasive and laying out what was going on in this situation, and eventually we went back and regrouped. And we said, look, we're not going to ever win a case against that defendant. Let's just let him out of the case. And we did.
But based on the evidence that he gave, we went back and started looking at the underlying transaction, and things started to fall into place. And that's why I came back and I asked you if I could amend my complaint to name these fellows Finecom and Sinoriches.
THE COURT: Is there, based upon your experience, anything in the New York convention that precludes a claim for alter ego liability?
MR. DUFFY: Absolutely not, your Honor. I've never

heard that before. And, I mean, I think I have seen cases

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afterwards. I think Orion was the case that was dealing with it. And I don't know why I still don't understand the logic of it, but they said, well, you can't do them all at once. You've got to have one proceeding to confirm the award. Then you have to have another proceeding to enforce the alter ego liability. And that's what I understood that case to say.

THE COURT: The decision was somewhat unclear on that, and I question whether it could have been an issue of jurisdiction, but the Court didn't explain, other than to say that the decision to enforce the arbitration award would be a streamlined, straightforward decision.

MR. DUFFY: Well, you've got to look at it in two steps, your Honor. I come in with an arbitration award, and I say, okay, this arbitration award was rendered in London. I come in under the convention. Contracting state, you have jurisdiction to confirm the award. Now, do you have jurisdiction to confirm the award against all other parties? Not necessarily. But you have jurisdiction over Finecom to the to the amount of quasi in rem jurisdiction to the amount of $150,000 where you can enforce the award to them in that amount, and that's because I established quasi in rem jurisdiction with the attachment.

THE COURT: Okay. Anything else?

MR. DUFFY: Did you want to hear any further points on the alter ego claim, the reasonable basis for a prima facie

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standard?

THE COURT: No.

MR. PAULSEN: Judge, just one brief comment on just the last thing that Mr. Duffy said that, yes, the jurisdiction is up to $150,000. It's quasi in rem, but we don't believe he can enforce the award against that without --

THE COURT: I'm sorry?

MR. PAULSEN: We do not believe that he can enforce the arbitration award obtained in London against that amount.

THE COURT: You mean up to that amount?

MR. PAULSEN: Up to that amount or for any amount because he has not named our client as a party to that proceeding.

THE COURT: Why?

MR. PAULSEN: We've had our conversation about it, but, I mean, if he is saying he can enforce that award against the $150,000 without more, without a finding somehow that our client is liable for the amount of that award --

THE COURT: The issue would be whether you can enforce against an alter ego an arbitration award.

MR. PAULSEN: Right, where the alter ego was not a party.

THE COURT: Where the alter ego was not a party to the arbitration itself. Is the alter ego found by the party who is the counterpart to the alter ego? Even if that were not

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true -- and I don't see any cases on that -- the plaintiff would still have the plaintiff's claim, which in this case it would not be a difficult claim, it seems to me, just based on the papers, to prove a breach of the charter party and then alter ego liability for that liability up to $150,000, even if they could not use as part of their proof the fact that there was an arbitration award.

MR. PAULSEN: Correct. Correct. It was the reference to the award that I was addressing.

THE COURT: So if you accept that, then it's preeminently clear that the attachment shouldn't be vacated. All of this is just over what's the proof that the plaintiff is going to have to put on to sustain the second claim, the alter ego liability of your client to the plaintiff. Can the plaintiff rely on the finding of liability in the London arbitration and proceed directly to the issue of alter ego liability, or does the plaintiff also have to prove, as part of the second claim, that there was a breach of the charter party and that the damages were in excess of $150,000?

MR. PAULSEN: Right. And we'd certainly argue that he could not rely on the award to that effect.

THE COURT: Okay. But all of that just means that it's eminently clear that the result today has to be to deny the motion to vacate the attachment.

MR. PAULSEN: We are still of the mind, your Honor --

THE COURT: What?

MR. PAULSEN: We're still of the mind, your Honor, as we expressed earlier, that we don't believe that that's in the nature of the moving attachment based on its historical perspective, but we understand what you're saying.

THE COURT: Okay. I don't want to repeat myself too much on this, but the one thing I still don't understand is you keep on saying that it's not within the historical scope of a Rule B attachment. And, again, I turn to all of you as the experts. I had thought that a Rule B attachment is there to have security for jurisdiction over a maritime claim. A maritime claim is broader than a London arbitration. Just because the overwhelming number of the Rule B attachments we get these days are in aid of London arbitration where the parties decide to have London solicitors argue it out in London doesn't mean that Rule B attachments are somehow limited to London arbitrations. Rule B attachments are broader. They're to provide security or jurisdiction for maritime claims, and maritime claims aren't limited to London arbitrations. Isn't that right?

When you talk about the historical purpose of Rule B attachments, I thought the historical purpose of Rule B attachments, going back many years, was not in aid of London arbitrations but, rather, in aid of the jurisdiction of this court to have security for jurisdiction over sailing ships

which could leave the New York harbor.

MR. DUFFY: Your Honor, I would just add in there I am familiar with a few recent cases besides London arbitration. We've done them in other places, but we've had a couple situations where there were oral maritime contracts, and nobody

ever specified a forum. And there was a dispute over whether they even agreed to London arbitration. So the attachment was initiated here, got jurisdiction over the parties' property and said if you don't want to agree to litigate this someplace else, we're going to litigate it before the Southern District of New York because they now have jurisdiction. And that's the way I've always understood it to work.

THE COURT: Okay. All right. I'm prepared to decide.

The defendant Finecom Shipping Ltd., "Finecom," moves pursuant to Rule E(4)(f) of the Supplemental Rules of Certain Admiralty and Maritime Claims to vacate an order of maritime attachment issued by this court on May 10, 2007. On February 14, 2007, the plaintiff, MTC Levant-Line GmbH, Bremen, "MTC Levant-Line" hereinafter, filed an Amended Verified Complaint against the defendant, alleging breach of a charter party, amended complaint paragraphs 10 to 17, and seeking an ex parte order of attachment in aid of a London arbitration against Pan-Pacific International Trading & Transportation Co., "Pan-Pacific Transportation," the actual signatory to the charter party, Id. at paragraph 13.

The Court reviewed the verified complaint and attorney affidavit and, after determining that the conditions of Supplemental Rule B appeared to exist, including that the defendant Finecom, along with the eight other defendants, was the alter ego of Pan-Pacific Transportation, entered an order dated February 15, 2007 authorizing process of maritime attachment and garnishment as against $150,000 of assets belonging to Finecom.

The parties subsequently appeared before the Court. Subsequent to that appearance, an arbitration award was obtained in London against defendant Pan-Pacific Transportation for demurrage related to the charter of the M/V Yelena Shatrova. See affidavit of Owen F. Duffy dated September 21, 2007, Duffy affidavit, Exhibit 34. See also Duffy affidavit, Exhibit 15. On September 7, 2007, defendant Finecom moved to vacate the attachment.

Rule E(4)(f) provides that, quote, whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules, unquote.

In order to obtain an attachment, apart from satisfying the filing and service requirements of Rules B and E, the plaintiff bears the burden of showing that, quote, one,

it has a valid prima facie admiralty claim against the defendant; two, the defendant cannot be found within the district; three, the defendant's property may be found within the district; and four, there is no statutory or maritime law bar to the attachment, unquote. Aqua Stoli Shipping Ltd., v. Gardner Smith Pty Ltd., 460 F.3d 434, 445, Second Circuit 2006; Wajilam Exports (Singapore) Pte. Ltd. v. ATL Shipping Ltd., No. 05 cv 7955, 2006 Westlaw 3019558, at *2, Southern District of New York, October 23, 2006.

The Court must vacate an attachment if the plaintiff

fails to sustain its burden of demonstrating that the requirements of Rule B and E are satisfied. Aqua Stoli, 460 F.3d at 445; Mediterranea Di Navigazione Spa v. Int'l Petrochemical Group, S.A., No. 06 cv 6700, 2007 Westlaw 1434985, at *1, Southern District of New York, May 15, 2007.

The defendant's challenge to the order of attachment essentially rests on two grounds. First, the defendant argues that the attachment must be vacated because an arbitration award that does not name Finecom has been awarded in the London arbitration, and moreover, that the plaintiff could not enforce the award against Finecom pursuant to the United Nations' Convention on the Recognition and Enforcement of Foreign Arbitrable Awards, "New York Convention," 9 USC Section 201. Second, the defendant argues that Finecom is not the alter ego of the judgment debtors and thus the plaintiff fails to make a

prima facie claim under Rule B.

The defendant argues that the attachment should be vacated because Finecom was not named as a party in the underlying arbitration. Specifically, the defendant contends that the Court may not use Rule B to attach the funds of a foreign defendant who is alleged to be the alter ego of a party to a foreign arbitration wherein an award was issued. The defendant's argument is not properly focused on the issue before the Court at this time.

The plaintiff asserts that it will seek to have the underlying arbitration award against the defendant Pan-Pacific Transportation confirmed against Finecom on the basis that Finecom was an alter ego of the other defendant. The issues on this motion are limited to whether the plaintiff satisfied the elements of a Rule B attachment. Claims based on allegations of alter ego may satisfy the prima facie admiralty case prong if the plaintiff seeks to enforce an arbitration award in an admiralty case against an alter ego of a party against whom the arbitration award was made. See SPL Shipping Ltd. v. Gujatat Cheminex Ltd., No. 06 cv 15375, 2007 Westlaw 831810, at *3, Southern District of New York, March 15, 2007. If the plaintiff has made out a prima facie case, the attachment may not be vacated at this stage, even though the defendant was not a named party to the London arbitration.

The defendant contends that Tide Line, Inc. v.

Eastrade Commodities, Inc., No. 06 cv 1979, 2005 U.S. District LEXIS 95879, Southern District of New York, August 15, 2006, "Tide Line I," suggests that Rule B is not the proper mechanism to enforce an award against the defendant who is not named in the arbitration and the issue of alter ego was not litigated in the foreign arbitration. The defendant reads too much into Tide Line.

In Tide Line, Chief Judge Wood dismissed a Rule B attachment obtained by the plaintiff Tide Line against an alleged alter-ego party, Transclear, on the grounds that the plaintiff insufficiently pleaded that the entity was the alter ego of the named defendant Eastrade Commodities, Inc. Chief Judge Wood stayed the release of the funds, however, and provided an opportunity to the plaintiff to amend its complaint to allege alter ego, which the plaintiff successfully did. Id.

at *49 to 50.

The defendant suggests that the Tide Line case stands for the proposition that the plaintiff may not proceed against Finecom in federal court because Finecom was not named in the London arbitration. The defendant points to Chief Judge Wood's discussion of how Tide Line could proceed against Transclear in the district court on the basis of alter-ego theory when Transclear was not named to the arbitration proceeding in London. Chief Judge Wood noted that it was unclear how Tide Line could attach property and litigate the liability of the

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alleged alter-ego defendant not named in an arbitration. Id. at *54. Chief Judge Wood also noted, however, that, quote, this does not suggest that Tide Line does not have a prima facie claim against Transclear, unquote. Id. at *55.

See also Tide Line, Inc., v. Transclear, S.A., No. 06 cv 1979, 2006 U.S. District LEXIS 60770, at *3, Southern District of New York, August 25, 2006, "Tide Line II," granting Tide Line's request for leave to file an amended complaint and noting that the issue needed to be further explored and did not render the granting of an opportunity to amend the complaint futile.

In any event, Tide Line was settled before the Court's decision on the motion to vacate and therefore does not stand for the proposition, as the defendant claims, that Rule B cannot be used to attach the funds of an entity who is alleged to be an alter ego of a party to a foreign arbitration.

Further, although the defendant rightly points out that the Court of Appeals has expressed that a motion to confirm an arbitrable award is generally an inappropriate occasion for a district court to consider an alter-ego theory of liability, see Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299, 301, Second Circuit 1963, that case concerned a commercial arbitration award sought to be enforced under the Federal Arbitration Act. The decision expressly found that the prevailing party in an arbitration

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could bring a separate action against an alleged alter ego of a party found to be liable in the arbitration. See Id. at *301.

There is nothing in Orion that would prevent an alter-ego claim being asserted against a nonparty to an arbitration when the claim was properly within the admiralty jurisdiction of the Court. Other cases have since noted that Orion does not serve as a complete bar to confirmation of an award against a nonparty to the arbitration. See Gvozdenovic v. United Airlines, Inc., 933 F.2d 1100, Second Circuit 1991, stating Orion Shipping is inapplicable in labor arbitration context; District Council No. 9 v. Apc Printing, Inc., 272 F.Supp.2d 229, 237-38, Southern District of New York 2003, noting other courts have found Orion does not preclude a finding of alter ego on a motion to confirm; Cf. Promotora De Navegacion S.A. v. Sea Containers Ltd., 131 F.Supp.2d 412, 422, Southern District of New York 2000.

The defendants do not cite any cases standing for the proposition that the plaintiff may not enforce an arbitration award against an alter ego where the Court's jurisdiction is based on its admiralty jurisdiction, and several judges in this

court have affirmed maritime attachments against alleged alter egos of parties against whom arbitration awards were entered. See SPL Shipping Ltd. at *3, collecting cases.

In any event, the only question presently before the Court, as in Tide Line, is whether the plaintiff has made a

prima facie alter-ego claim sufficient to attach the funds of the defendant under Rule B.

The Court now looks to whether the plaintiff has alleged a prima facie alter-ego case against the defendant Finecom. Although the defendant argues that the plaintiff must show that reasonable grounds exist for the attachment, the Court will follow the majority of the courts in this district in applying the prima facie standard to evaluate whether pleadings make out a prima facie case of alter ego, as this standard more closely complies with the Second Circuit Court of Appeals' rejection of the "broader Rule E4(f) inquiry" that the reasonable grounds test calls for.

See Aqua Stoli, 460 F.3d at 436; see also Wilhelmsen Premier Marine Fuels AS v. UBS Provedores Pty Ltd., 07 cv 5798, 2007 Westlaw 2872477, at *9, Southern District of New York, September 28, 2007; Dolco Investments, Ltd. v. Moonriver Development, Ltd., 486 F.Supp.2d 261, 266, Southern District of New York 2007; SPL Shipping Ltd., 2007 Westlaw 831810, at *3; Tide Line, 2006 U.S. District LEXIS 95870, at *53; but see Wajilam Exports (Singapore) Pte. Ltd. v. ATL Shipping Ltd., 475 F.Supp.2d 275, 283-84, Southern District of New York 2006, applying a "reasonable grounds" standard.

While as a general matter the existence of a corporate relationship alone is insufficient to bind a nonparty to an agreement, the corporate veil will be pierced in order to, A,

prevent fraud or other wrong or, B, where a parent dominates a subsidiary to such a degree as to demonstrate an abandonment of corporate separateness. See Thomson-CSF S.A. v. American Arbitration Association, 64 F.3d 773, 777, Second Circuit 1995.

The Court of Appeals has enumerated several factors to help courts determine whether a corporation is dominated and controlled. Quote, one, the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like; two, inadequate capitalization; three, whether funds are put in and taken out of the corporation for personal rather than corporate purposes; four, overlap in ownership, officers, directors, and personnel; five, common office space, address and telephone numbers of corporate entities; six, the amount of business discretion displayed by the allegedly dominated corporation; seven, whether the related corporations deal with the dominated corporation at arm's length; eight, whether the corporations are treated as independent profit centers; nine, the payment or guarantee of debts of the dominated corporation by other corporations in the group; and ten, whether the corporation in question had property that was used by other of the corporations as if it were its own, unquote.

William Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 139, Second Circuit 1991;

Tide Line, Inc., 2006 U.S. District LEXIS 95870, at *37-36. The district court should exercise only a very limited inquiry into the underlying facts in light of the Aqua Stoli decision. As Chief Judge Wood noted in Tide Line, it is not necessary for the plaintiff to submit evidence as to these factors but only for the pleadings to allege sufficiently alter-ego status. Tide Line, 2006 U.S. District LEXIS 95870, at *38-39.

The plaintiff's verified amended complaint more than sufficiently makes a prima facie case for alter ego. In the amended complaint, the plaintiff alleges that Finecom controlled and dominated Pan-Pacific Transportation, that Pan-Pacific Transportation was undercapitalized and had no tangible assets or independent discretion, that Finecom's funds were intermingled with Pan-Pacific Transportation and that Finecom is the alter ego of Pan-Pacific Transportation and, as such, is liable for the breach of the maritime contract. See amended complaint paragraphs 18 to 32.

These allegations include several factors courts can consider when determining whether a corporation is dominated and controlled by another, and are sufficient to satisfy the requirements of the prima facie standard for alter ego. See SPL Shipping Ltd., 2007 Westlaw 831810, at *4.

It should also be noted that the plaintiff has presented reasonable grounds for its allegations of a prima facie case. Therefore, the defendant's motion to vacate the

attachment, and to the extent that it is a motion to dismiss the allegations in the first amended complaint also, is denied.

So ordered. Now it would appear that a scheduling order is appropriate, since the case is going forward. How long to complete discovery? And what about the other defendants, or is Finecom the only defendant that's been --

MR. DUFFY: Finecom is the only defendant that we've been able to attach funds of, your Honor.

THE COURT: I imagine that Finecom wants to proceed expeditiously because it has money at stake.

MR. PAULSEN: I'd expect that would be the case, although we're talking about discovery that is cross-border and takes time.

THE COURT: I usually don't do scheduling conferences on the record, so I'm prepared to go off the record unless the parties want this on the record.

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